

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GABRIEL LOPEZ QUINO, ERICA LOPEZ QUINO, and CANDELARIA CALEL CHITIC, individually and on behalf of others similarly situated,

Plaintiffs,

v.

CHEBURECK INC. (D/B/A SHASHLICHNAYA) AND ISAK SIONOV (A.K.A ISAK MASTYROV),

Defendants.

MEMORANDUM AND ORDER

NOT FOR PUBLICATION

20-cv-3393 (LDH)(TAM)

LASHANN DEARCY HALL, United States District Judge:

Plaintiffs Gabriel Lopez Quino, Erica Lopez Quino, and Candelaria Calel Chitic (“Plaintiffs”) bring claims against Defendants Chebureck Inc. (d/b/a Shashlichnaya) and Isak Sionov (a/k/a Isak Mastyrov) (collectively “Defendants”) pursuant to the Fair Labor Standards Act (“FLSA”) and the New York Labor Law (“NYLL”). Defendants assert a single counterclaim against Plaintiffs for attorney’s fees.

By way of background, Plaintiffs initiated this action on July 28, 2020. (Compl., ECF No. 1.) Plaintiffs filed a first amended complaint on November 17, 2020, (First Am. Compl., ECF No. 13), which Defendants answered on February 2, 2021, (Answer, ECF No. 26.) In Defendants’ answer to the first amended complaint, Defendants asserted a counterclaim stating: “Defendants are entitled to their reasonable attorney’s fees, to the extent that Defendants are the prevailing parties on grounds that Plaintiffs’ claims are vexatious and have been litigated in bad faith.” (Answer at 11.) Plaintiffs moved to dismiss the counterclaim and requested leave to file an amended complaint to add retaliation claims under the FLSA and NYLL, contending that

Defendants' counterclaim is frivolous and retaliatory. (Pls.' Mem. Supp. Mot. Dismiss Counterclaim at 4–5, ECF No. 34.) While Plaintiffs' motions to dismiss and for leave to amend the complaint were pending, Plaintiffs filed a second amended complaint that did not assert any retaliation claim. (Sec. Am. Compl., ECF No. 36.) Defendants did not oppose Plaintiffs' filing and answered the second amended complaint on August 10, 2021, asserting the same counterclaim. (Answer Sec. Am. Compl., ECF No. 38.) Plaintiffs did not move to dismiss the counterclaim asserted in Defendants' answer to the second amended complaint.

Because Plaintiffs filed the second amended complaint with no objection from Defendants and because the second amended complaint does not assert any retaliation claim, Plaintiffs' motion for leave to amend to add a cause of action for retaliation is DENIED AS MOOT. Further, because the second amended complaint is now the operative complaint and because Defendants' answer to that complaint is now the operative answer, Plaintiffs' motion to dismiss the counterclaim asserted in Defendants' answer to the first amended complaint is DENIED AS MOOT.

SO ORDERED.

Dated: Brooklyn, New York
February 22, 2022

/s/ LDH
LASHANN DEARCY HALL
United States District Judge